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NO. 84- _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD CLEMENTS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Given this Court's recognition of the "due process entrapment defense" in Hampton v. United States, 425 U.S. 484 (1976), and given the fact that inferior federal courts, including the court below in this case, have struggled with deciding when and where the due process defense controls, should this Court review the defense and attach to it standards that will enhance predictability of when the defense should and should not apply?

PARTIES INVOLVED

The parties involved in this petition are Richard Clements, petitioner and defendant below, and John A. Belzer, Jr. and John Evans, defendants below, and the United States of America, respondent and plaintiff below.

Mr. Hamilton, one of petitioner's counsel, represented John A. Belzer, Jr., by appointment, through the appeal for to the Seventh Circuit. Before agreeing to represent Mr. Clements on this petition Mr. Hamilton personally informed Mr. Belzer that he could join in this petition. Mr. Belzer stated clearly that he did not wish to do so.

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Richard Clements prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The decision of the court of appeals (App. A, infra, 1a - 37a) is reported at 743 F.2d 1213.

JURISDICTION

The judgment of the court of appeals (App. B, infra, 38a - 39a) was entered on September 18, 1984 and a suggestion for hearing in banc was denied on October 18, 1984 (App. C, infra, 40a - 41a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in part,

> No person shall be. . .deprived of life, liberty, or property, without due process of law. . . .

2. The Fourth Amendment to the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. The defendants were charged below with violation of the following statutes: 18 U.S.C. §§371, 471, 474. Those statutes are set forth below. (App. D, infra, 42a - 45a).

STATEMENT OF THE CASE

1. Proceedings Below.

On March 4, 1983 John A. Belzer, Jr., Harold Clements, Richard Clements and John Evans were charged in a five count indictment filed in the United States District Court, Northern District of Indiana (South Bend Division) with conspiracy to commit, and the commission of, various acts constituting or relating to counterfeiting. Specifically they were charged with conspiracy to violate 18 U.S.C. §§ 471 and 474 as proscribed in 18 U.S.C. § 371, and several violations of 18 U.S.C. § 474. (ibid.).

During trial the indictment against Harold Clements was dismissed. As to the other defendants the jury found Richard Clements guilty of three of the five counts and the other defendants guilty on all counts.

All remaining defendants appealed to the United States Circuit Court for the Seventh Circuit, and, on September 18, 1984, that court affirmed the judgment. John Belzer filed a suggestion that the case be heard by the Seventh Circuit in banc on October 1, 1984. Treating the suggestion as a petition for rehearing as well as a request for in banc hearing, the Seventh Circuit denied it on October 18, 1984. (App. C, infra, 40a-45a).

2. Statement of Facts.

Counterfeiting in 1982

During the summer of 1982 a James Farthing traveled from Indiana to Florida

to purchase some counterfeit currency from John Belzer and John Evans. No purchase took place because of the bills' poor quality. (App. A, infra, 3a). Belzer and Evans attempted to produce counterfeit material in Indiana. They used various items of equipment which they had purchased in that state. (ibid.).

Richard Clements' involvement in the venture began with his providing $5,000 to partially finance the venture. (Id., 3a-4a). While Clements knew Farthing, he did not know Belzer or Evans until a trip to Florida in February, 1983. (Tr. 731, 1237).

The counterfeiting venture in 1982 failed. After several weeks of effort Farthing, Belzer and Evans abandoned the project. Belzer and Evans returned to Florida. Clements had the equipment

hauled away and stored in a trailer. (App. A, infra, 4a).

In early December, Clements contacted Farthing about producing counterfeit currency. He expressed interest in having the other actors (Belzer and Evans) return to Indiana and participate. (id., 5a).

The Government Becomes Aware

Sometime before December 1982, the Secret Service learned that Farthing was involved in a counterfeiting operation. By December it knew that Farthing had been arrested on Indiana state drug charges. (ibid.).

An agent of the Secret Service contacted Farthing in late January, 1983. The agent obtained Farthing's agreement to assist the Service in an investigation of Belzer, Evans and Clements in return for help with his state charges. (id., 5a-6a).

The Investigation

The Secret Service gave Farthing tape recording equipment. On February 1, 1983 and for several days thereafter, Farthing initiated or engaged in several telephone conversations with Clements, Evans and Belzer. During those conversations, Farthing promoted the idea of counterfeiting currency in Indiana. (App. A, infra, 6a-8a). None of the future defendants was opposed to the idea of counterfeiting, but Farthing was required to persuade Belzer and Evans to leave Florida to do so; both men resisted the idea of traveling to Indiana to do the work. (id., 8a).

Farthing did at length prevail. In the process he promised Belzer and Evans that they would receive $500 each at the outset, that Clements would finance the operation and that Clements would drive

them from Florida to Indiana. (App. A, infra, 8a).

The Conspiracy Underway

Clements did drive to Florida where he first met the two men. On February 10, Clements, Belzer and Evans began the drive to a slaughterhouse on Harold Clements' farm. It was there that the counterfeiting was to take place, the equipment in Clements possession having been moved there. (id., 8a-9a).

While the three men were on their way, the Secret Service rented a graphic arts camera and delivered it to the slaughterhouse. Clements, Belzer and Evans arrived at the farm on Saturday, February 11. The next day, Sunday, the effort to counterfeit began. At the outset Farthing taught Belzer and Evans how to operate the graphic arts camera. (id., 9a-10a).

Farthing visited the slaughterhouse

nearly every day. He supplied the Secret Service with daily status reports on the operation. (App. A, infra, 9a-10a).

The Search Warrant and Changed Facts

The Secret Service obtained a search warrant on Monday, February 14, 1983. In the meantime, at Belzer's and Evans' request, on Wednesday, February 16, in the company of a Secret Service agent, Farthing bought additional printing supplies, including green tinted paper. Later that day he delivered the material to the slaughterhouse. (id., 10a; Tr. 247-48, 668-69, 671-73, 736, 778, 780-821, 1279-80; Belzer Exh. E).

A completed counterfeit bill ($20.00) -- that is, with a front and back -- was not produced until later in the day on Thursday, February 17, 1983. (Tr. 165-66, 220-21, 704-05).

The Secret Service and others executed

the search warrant at 10:00 or 11:00 p.m. on Friday, February 18, 1983. (App. A, infra, 10a; Tr. 169, 324, 877).

3. The Seventh Circuit's Decision.

The Defendants' Position

The primary claim by all the defendants on appeal was that, while there was evidence that each was predisposed to commit offenses which involved counterfeiting, the government's actions were such that,

(a) their rights to due process under the United States Constitution were violated; and

(b) their convictions should be reversed on the basis of the court's authority and duty to supervise its processes.

The defendants' positions were based on contentions that the Secret Service became so involved in the criminalizing process that it instigated and underwrote a crime that, without its involvement,

would and could never have occurred. As an essential part of their position the defendants argued that the Secret Service's act of waiting for four days before executing the search warrant violated their rights under the Fourth Amendment.

During that four day wait, defendants contended,

(a) the government's informant supplied them with printing supplies and green tinted paper;

(b) the defendants began to produce completed counterfeit currency one day before the search occurred.

As a result, the facts on which the warrant was issued necessarily were changed -- in one case by the acts of the Secret Service's own agent.

The Appellate Court's Reaction

The Seventh Circuit ruled that the Secret Service's actions did not con-

stitute "outrageous government conduct in violation of the due process clause" and did not present the court with a basis for exercise of its supervisory powers. (App. A, infra, 28a).

As to the Secret Service's handling of the search warrant and its bearing on the due process claim, the court ruled that defendants failed to show that the government agents intended to do wrong by waiting. (id., 30a-31a). The court implicitly suggested in the process that government agents, armed with a search warrant, could wait as long as needed for the subjects of the future search to create the contraband the search was intended to recover. (id., 31a-32a).

Having addressed the defendants' Fourth Amendment argument on the merits, the court concluded that it need not decide that executing the warrant on the

changed facts referred to made it invalid. The court based its conclusion on the ground that the only way such invalidity could be preserved is by a motion to suppress evidence. The court went on to state, however, that even were improper execution of a search warrant relevant to a due process argument, where, as in this case, it was not shown that the government "intentionally manipulated or abused the judicial process," its conduct would not provide sufficient basis for reversal. (App. A, infra, 35a-37a).

REASONS FOR GRANTING THE WRIT

This Court Should Review the "Outrageous Conduct" Standard Heretofore Used in Due Process Entrapment Cases Because it is Vague, Inherently Subjective and, Finally, Inspires, Rather than Limits, a Multiplicity of Trial Court Issues and Consequent Appellate Litigation.

In Hampton v. United States, 425 U.S. 484, 492-94, 497, 499 (1976) this Court

acknowledged that the due process clause might invalidate the conviction of a defendant who, because he was predisposed to commit crime, could not rely on the "common law" defense of entrapment recognized in Sorrells v. United States, 287 U.S. 435, 451 (1932).

As is well known, Sorrells embodied what was to become a continuing debate on whether evaluation of "common law" entrapment was to be done by an objective or by a subjective standard. id., 451-52, 458-59. The objective standard, proposed by Justices Roberts in Sorrells, id., 454-55, 457-59, and Frankfurter in Sherman v. United States, 356 U.S. 369, 382-85 (1958), among others, called for a weighing of the government's actions. According to this view the moral worth and intent of the defendant was irrelevant. The theory that succeeded was the

subjective standard. It made the defendant's character and intent a condition precedent to determining whether an entrapment occurred. If evidence supported the fact finder's conclusion that the defendant was predisposed, the entrapment defense was not available to him -- presumably no matter what the government might have done to bring him to the dock. See, Hampton v. United States, supra, 425 U.S. 484, 488-90.

No doubt it was the implicit radicalism of the conclusion just expressed ("if predisposed, the government can do anything") that compelled recognition of the due process defense in United States v. Russell, 411 U.S. 423, 431-32 (1973) and Hampton. However, after more than eight years of lower courts' straining to define what conduct calls the defense into play, e.g., United States v. Kaminski,

703 F.2d 1004, 1009 (7th Cir. 1983) ("The Supreme Court has not yet given any content to the principle that governmental misconduct may bar prosecution even absent any other deprivation of defendant's constitutional rights."); United States v. Jannotti, 673 F.2d 578, 606 (3rd Cir. 1982), cert. denied, 457 U.S. 1106 (1983) (". . .delineation of the conduct circumscribed by the due process defense is, at best, elusive."), it seems appropriate for this Court to clarify the situation.

If the Court wishes to layer an additional, wholly subjective, standard onto the Sorrells-Sherman type of situation, already governed by, at least, a partially subjective test, it should say so. Then lower courts need not strain to find precedent for the conclusions they

reach in response to claims of due process violations.

On the other hand, it seems not impossible to establish a set of objective criteria by which government conduct in the course of intrusive or pre-emptive investigations can be measured. The New York Court of Appeals did so as it construed its due process clause. People v. Isaacson, 44 N.Y.2d 511, 521-22, 406 N.Y.S.2d 714, 719-20, 378 N.E.2d 78, 83 (1978). Commentators have urged in the context of cases similar to this one that a Rochin "shocks the conscience"[1] "standard" need not be used. Note, Entrapment as a Due Process Defense: Developments After Hampton v. United States, 57 Ind. L.J. 89, 102-13 (1982); Gershman, Entrapment, Shocked Consciences, and the Staged Arrest, 66 Minn. L.Rev. 567, 596-611 (1982).

1. Rochin v. California, 342 U.S. 165, 172 (1952).

The case before this Court demonstrates the need for order and predictability. No doubt consistent with an inherent bias in favor of predictability, the appellate courts are attempting to give substance to the terms "outrageous conduct."

One appellate court has concluded that the requisite level of outrageousness is not established unless "coercion, violence or brutality to the person" is shown. "Flagrant misconduct on the part of the police" is not enough. United States v. Kelly, 707 F.2d 1460, 1476 & n. 13 (D.C. Cir.) cert. denied, 104 S.Ct. 264 (1983) (Ginsburg, J., in separate opinion).

On the other hand the Seventh Circuit has added the word "truly" to bring some definition to the problem. Due process will not provide a defense unless the official conduct is "truly outrageous."

However, the "truly outrageous" standard might be avoided in a due process entrapment case if violation of an independent constitutional right can be shown. In United States v. Kaminski, supra, 703 F.2d 1004, 1009, the court said,

> Assuming no independent constitutional right has been violated, governmental misconduct must be truly outrageous before due process will prevent conviction of a defendant.

In United States v. Thoma, 726 F.2d 1191 (7th Cir.) cert. denied, 104 S.Ct. 2683 (1984), the defendant, taking his cue from Kaminski, argued that his independent right under the First Amendment had been violated in the course of governmental misconduct and therefore the "truly outrageous standard" should not apply to his due process entrapment defense. In response the court acknowledged the argument,

> We. . .agree that if the Government violated this [constitutionally protected] right in the course of investigating defendant, then the "truly outrageous" standard would not be applicable. Id., 1198.

It was, of course, this language in Kaminski and Thoma that inspired the Fourth Amendment argument below. If the defendants' Fourth Amendment rights had been violated by a delay during which the facts were changed (in part by the Government itself), and during which at least one crime, counterfeiting $20 bills, was effected, then by its own standard the Seventh Circuit would be compelled to use some standard other than "truly outrageous." What that standard might be remains at this point unknown.

What has just been said might be dismissed as nothing more than carping by disappointed defense counsel. That is not its intent.

What Kelly, Kaminski and Thoma as well as the other cases cited earlier reflect, is disagreement, confusion and what appears to be an utter lack of definition as inferior courts attempt to cope with a standard that is no standard at all. On the contrary, the words "outrageous conduct" appear to be achieving nothing more than formless litigation in every case where the government's actions appear in any way to be intrusive and where the defendant might be found to be predisposed. That description applies to a good number of cases flowing through the federal system.

CONCLUSION

After more than eight years of formlessness and its effects, it is time for this Court to review the bases on which the due process entrapment defense will lie. The "outrageous conduct" formula is subjective, incapable of definition, and, because it inspires litigation rather than governing it, is cost ineffective.

A writ should issue in this case.

Respectfully submitted,

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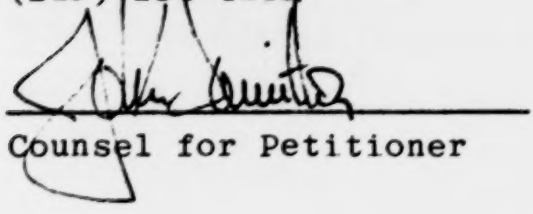

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November 1984

APPENDIX A

Opinion of the Court of Appeals

of

September 18, 1984

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Argued May 31, 1984
Decided September 18, 1984

Nos. 83-2130, 83-2146, 83-2175

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN A. BELZER, JR., JOHN M. EVANS and RICHARD CLEMENTS,

Defendants-Appellants

Before:

POSNER and FLAUM,

Circuit Judges

and

GORDON,*

Senior District Judge

* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

FLAUM, Circuit Judge. This is an appeal following a jury trial in which the defendants were convicted of violating federal counterfeiting laws. The defendants' main argument on this appeal is that the government's undercover operation leading to their arrests was so outrageous as to violate fundamental principles of due process. We disagree, and we affirm the convictions.

I

During the summer of 1982, James Farthing traveled from Indiana to Florida to purchase counterfeit currency from the defendants John Evans and John Belzer. He did not make the purchase, however, because the quality of the bills was poor. Later that summer, Farthing, Evans, and Belzer decided to make counterfeit currency together. They bought a printing press from an Indiana company, as well as an arc light plate burner, a vacuum table, a platemaker, paper, and various printing supplies. Shortly thereafter, they determined that they needed $5,000 more to finance their counterfeiting operation, and began to search for someone to provide them with this amount.

At the same time, the defendant Richard "Pete" Clements was looking for a

source of counterfeit currency. Through mutual acquaintances, it was arranged for Clements to provide Farthing, Evans and Belzer with $5,000. Clements supplied the money, requesting that in return he get as much counterfeit currency as he could.[1]

Evans, Belzer and Farthing then began to attempt to produce counterfeit currency in a garage in Indiana. However, they had difficulty operating the printing press and were unable to produce bills of high quality. After several weeks they abandoned the project. At this point, sometime in November 1982, Evans and Belzer returned to Florida, and Clements had the equipment hauled away and stored in a trailer.

1. Clements, the only defendant who testified at trial, disputed this version of the facts. He stated that he gave the $5,000 to an acquaintance as a loan to help finance a vending machine business.

In early December 1982, Clements contacted Farthing about the possibility of renewing the counterfeiting effort. During December and January, the two had several more discussions about this subject. During these discussions, Clements expressed an interest in having Belzer and Evans return to Indiana to resume the counterfeiting.

In late January 1983, Farthing was contacted by United States Secret Service Agent Lawrence D. Haas, Jr. The Secret Service had received a tip from a confidential informant several months earlier, informing it that Farthing was involved in a counterfeiting operation. In December 1982, the Secret Service had learned that Farthing had been arrested on drug charges in Indiana. Thus, in late January 1983, Haas and Farthing discussed the possibility of Farthing

assisting the Secret Service in an undercover investigation of Belzer, Evans, and Clements. Farthing agreed to assist the Secret Service, and in return Haas promised to make Farthing's cooperation known to the Indiana authorities involved in Farthing's drug prosecution. Haas supplied Farthing with equipment for tape recording phone conversations, and requested that he contact Clements, Belzer and Evans about resuming their counterfeiting operation.

On February 1, 1983, Farthing made the first of many tape recorded phone calls to the defendants. In a conversation with Clements, he suggested that they plan another attempt at counterfeiting, and Clements agreed. The two men then began to discuss the details of the operation. At this time, Clements indicated that he would be willing to travel to

Florida to pick up Belzer and Evans and bring them back to Indiana.

On February 2, Evans phoned Farthing, returning a call Farthing had made to him earlier. They discussed the counterfeiting operation. Farthing told Evans that they would be purchasing additional equipment and thus would be able to make counterfeit bills of better quality than those they had made previously. Evans then indicated that he could make counterfeit money, and that he would be willing to try again. During the next few days, Evans and Farthing had several more phone conversations in which they discussed counterfeiting. During one of these discussions, Evans stated that he and Belzer in the past had made counterfeit currency that was not high quality, but that had "passed." Tr. at 571.

During several other phone conversations with Farthing, Evans showed some resistance to traveling to Indiana. He stated that he and Belzer would prefer to run the counterfeiting operation in Florida. At several points, Evans indicated that they might withdraw from the scheme altogether. Farthing also spoke with Belzer, who also stated that he did not want to leave Florida. Ultimately, however, Farthing was able to persuade Evans and Belzer to travel to Indiana. In so doing, he promised them that they would receive $500 each up front, that all the money to finance the operation would be supplied by Clements, and that Clements would travel to Florida and drive them back to Indiana.

On February 10, Clements met Belzer and Evans in Florida and the three men set out for Indiana. While they were

traveling, the Secret Service rented a graphic arts camera and brought it to a slaughterhouse located on a farm that was owned by Clements's brother, which is where the counterfeiting operation was to take place. This camera is used to make photographic negatives which are then used to make offset printing plates, and it is available commercially. The other counterfeiting equipment had already been set up in the slaughterhouse.

Clements, Evans, and Belzer arrived at the farm on February 11, and the counterfeiting operation began the following day. Throughout the next week, Belzer and Evans worked on producing the counterfeit currency, with Belzer primarily responsible for making the printing plates and Evans primarily responsible for operating the printing press. Farthing was not actively involved in the day-to-day

operation, though he did visit the slaughterhouse nearly every day. In addition, Farthing instructed Evans and Belzer on operating the graphic arts camera, and he supplied them with some light sensitive tape used in platemaking.

During this time, Farthing was supplying the Secret Service with daily status reports on the counterfeiting operation. On February 14, the Secret Service sought and received a search warrant for the slaughterhouse. On February 16, before the warrant was executed, Farthing purchased additional printing supplies that had been requested by Evans and Belzer, and delivered them to the defendants. On February 18, pursuant to the warrant issued several days earlier, the Secret Service entered the slaughterhouse and arrested the defendants.

The defendants were charged with five

counts of violating federal counterfeiting laws, 18 U.S.C. §§ 471, 474 (1982), and with conspiracy to violate federal law, 18 U.S.C. § 371 (1982). The case proceeded to a trial before a jury on April 18, 1983. The defendants' primary defense was that they had been entrapped or that they had been denied due process of law because of governmental misconduct. The jury returned guilty verdicts against Belzer and Evans on all five counts, and against Clements on three of the counts, acquitting him on the other two. The defendants' post-trial motions were denied, and each was sentenced to prison. Evans for five years and Belzer and Clements for three. This appeal followed.

II.

The defendants have not argued entrapment on this appeal, conceding that

there was sufficient evidence of their predisposition to counterfeit to support the jury's verdict. Thus, their primary argument is that the government undercover operation leading to their arrests violated their rights to due process of law and that therefore their convictions should be vacated. In addition, they contend that the government's four-day delay in executing its search warrant violated their constitutional rights, and that this is another reason that their convictions should be vacated.[2] As an alternative to their contention

2. Clements has also argued that the district court denied him a jury drawn from a fair cross-section of the community, because it excused the only member of the jury panel who resided in his county. Clements has not claimed, however, that the process used to derive the panel was in any way unfair. In view of this, and because tne district court had a proper reason for excusing the prospective juror - his exposure to pre-trial publicity - we reject Clements' argument.

that their rights were violated, the defendants argue that the government's conduct in this case compels us to vacate the defendants' convictions in the exercise of our supervisory powers over the administration of criminal justice.

A. The Undercover Operation

In United States v. Russell, 411 U.S. 423, 431-32 (1973), the Supreme Court stated that "we may some day be presented with a situation in which the conduct of the law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Several years later, in Hampton v. United States, 425 U.S. 484 (1976), five justices of the Supreme Court reaffirmed the principle that criminal defendants may present a defense based on outrageous governmental miscon-

duct, regardless of the defendant's predisposition to commit the crime charged. This circuit also has recognized the existence of such a defense. See, e.g., United States v. Kaminski, 703 F.2d 1004, 1009 (7th Cir. 1983).

The due process defense, however, has been invoked successfully only on a few occasions. As this court has noted:

> [A]n examination of the post-Hampton cases decided by the courts of appeals indicates that due process grants wide leeway to law enforcement agencies in their investigation of crime. Assuming that no independent constitutional right has been violated, governmental misconduct must be truly outrageous before due process will prevent conviction of the defendant.

Id. at 1009. The defendants argue that the Secret Service's conduct in investigating their counterfeiting activity was "truly outrageous." We disagree.

The defendants' main argument is that the government "manufactured" the counterfeiting crime of which they were convicted. According to the defendants, the crime would not have occurred but for the government's participation, through its informant, Farthing. Specifically, the defendants complain that Farthing induced them to resume the counterfeiting efforts that they already had abandoned, and furthermore that without the supplies and expertise that he provided, they would not have been able to produce counterfeit bills of sufficient similitude to real currency to constitute a violation of federal counterfeiting laws. See, United States v. Johnson, 586 F.2d 395, 397-98 (5th Cir. 1978) (discussing the requirement under 18 U.S.C. § 474 that counterfeit currency resemble genuine currency), cert. denied, 440 U.S. 926

(1979).

Turning first to the defendants' claim of inducement, this court recently stated that "[w]hen a defendant is predisposed to commit the offense due process cannot be violated by Government inducement. . . ." United States v. Thoma, 726 F.2d 1191, 1199 (7th Cir.), cert. denied, 104 S. Ct. 2683 (1984). We have not stated, however, that the inducement offered by the government cannot be considered in determining whether the government's conduct is so outrageous as to warrant the invocation of our supervisory powers. Assuming that it can be,[3] it

3. Because in the exercise of our supervisory powers we focus on the actions of the government rather than on the defendant, we can imagine a situation where the nature of the government inducement should be considered in assessing the outrageousness of the government's conduct, even though the defendant is predisposed to commit the crime charged. In this case, for example, if the Secret Service, through Farthing, had
(Footnote continued on following page)

is nevertheless clear that the government's inducement in this case was proper. This is not a case in which the government's inducement to commit the crime was "exceedingly generous," see United States v. Jannotti, 673 F.2d 578, 600 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) or in some other way excessively coercive. See, Greene v. United States, 454 F.2d 783 (9th Cir. 1971) (government agent used veiled threats to induce crime). In fact, the government did not even initiate the counterfeiting operation. Not only had there been a prior counterfeiting attempt involving all of the defendants just be-

2. (continued) made a credible threat of violence toward one of the defendants and/or his family members if he refused to assist in the counterfeiting operation, we would be abdicating our responsibility if we did not consider this fact in assessing the defendants' outrageous conduct claim.

fore the government's intervention, but it was the defendant Clements who first contacted Farthing about resuming the operation. Farthing, working undercover, did induce the already predisposed team of Evans and Belzer to continue their counterfeiting, but the small amount offered to them hardly gives rise to an outrageous government conduct claim. "[T]he offer of a reasonable inducement [is a] proper means of investigating crime." United States v. Kaminski, 703 F.2d at 1009.

The defendants also complain that the government provided them with supplies and expertise that were indispensable to their counterfeiting operation.[4] It is

4. There is some indication in the record that Farthing may have paid for some of the supplies himself, or that he may have been reimbursed by Clements and not the Secret Service for some of his expenses. Whether this lessens the government's degree of involvement in the
(Footnote continued on next page)

government may supply some items of value toward the perpetration of the criminal enterprise. See, e.g., United States v. Leja, 563 F.2d 244 (6th Cir. 1977) (government supplied legally obtainable chemicals to illegal drug manufacturers), cert. denied, 434 U.S. 1108 (1978); United States v. Gonzales, 539 F.2d 1239 (9th Cir. 1976) (government agents were "actively involved in purchasing ink and other supplies, as well as a functioning press," in support of counterfeiting operation). Cf. Hampton v. United States, 425 U.S. 484 (1976) (government supplied actual contraband which defendant was convicted of selling). Here, the supplies and equipment provided by Farthing were all commer-

4. (continued) counterfeiting operation for purposes of an outrageous government conduct claim is a question we need not address, in view of our holding.

cially available, and could have been purchased by the defendants themselves. Moreover, Farthing provided only one of several pieces of equipment necessary to the counterfeiting operation, and only a portion of the necessary supplies. Under these circumstances, the government's degree of involvement in supplying the means to commit the crime falls short of being considered outrageous.

With regard to the expertise provided by Farthing, the defendants point to their earlier bungled counterfeiting attempt as evidence that they could not have produced passable counterfeit bills without his help. However, the record indicates that Farthing had very little to do with the actual production of the counterfeit bills; all he did was instruct the defendants on operating the graphic arts camera. This was not such

a complex task that they probably could not have done it without his help. See, United States v. Twigg, 588 F.2d 373, 381 (3d Cir. 1978) (outrageous government conduct found where government agent provided all knowledge of chemistry necessary to manufacture illegal drug; defendants had no knowledge of chemistry).[5]

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5. The defendants rely heavily on Twigg which is the only court of appeals decision since Hampton to vacate a conviction on the basis of outrageous government conduct. In Twigg, the Third Circuit found that the Drug Enforcement Agency was excessively and thus impermissibly involved in the illegal manufacture of methamphetamine. Twigg is distinguishable from the case before us because in Twigg the government agents and their informant originated the idea of establishing an illegal methamphetamine laboratory, and the informant was "completely in charge" of the production process and supplied all the laboratory expertise. United States v. Twigg, 588 F.2d at 380-81. In addition, we note that there is a significant question as to whether Twigg is still good law in the Third Circuit. See, United States v. Beverly, 723 F.2d 11, 12 (3d Cir. 1983) (per curiam).

The defendants did have some experience counterfeiting, and, according to Evans's own statement, in the past had produced counterfeit bills that had "passed." Under these circumstances, it was certainly permissible for Farthing to provide the defendants with some technical expertise to facilitate their counterfeiting. See, United States v. Reifsteck 535 F.2d 1030, 1035 (8th Cir. 1976) (actual printing of counterfeit bills done by government agents); United States v. McGrath, 494 F.2d 562 (7th Cir. 1974) (government agents supervised actual printing of counterfeit bills).

Even considering all of the government's actions together, rather than separately, we are not persuaded that the government can be said to have "manufactured" the defendants' crime. The defendants have conceded that there was

sufficient evidence for the jury to find them predisposed to counterfeit. While we recognize that a person who is predisposed to commit a crime might choose not to act on that predisposition, see Note, Entrapment as a Due Process Defense: Developments After Hampton v. United States, 57 Ind. L.J. 89, 126-29 (1982), or in unusual circumstances might be unable to commit the crime, courts have never required prosecutors to prove to a high degree of certainity that a predisposed defendant in a particular case actually would have committed the crime even without the government's intervention. Cf. United States v. Kaminski 703 F.2d at 1008 ("there is no infallible means of divining a defendant's predisposition after the fact"). Here, the Secret Service intercepted a counterfeiting operation that at the time was,

if not ongoing, at least fairly likely to be revived successfully. On the facts of this case, we reject the defendants' claim that the government "manufactured" the crime of which they were convicted.

In addition to arguing that the Secret Service "manufactured" their crime, the defendants complain of the manner in which the investigation was conducted. Specifically, they claim that the Secret Service agents had "an overriding desire to obtain a conviction as an end in itself and to create a crime rather than pursue legitimate law enforcement goals of preventing further crime." Clement's Br. at 20. In addition to reiterating the claims that we have already rejected, the defendants support this argument by pointing to the government's use of "a known counterfeiter and convicted felon"

as an informant, and to "intentionally . . . deceptive and dishonest acts" committed by Farthing in the course of his undercover work. Clements's Br. at 17, 20.

We can reject these claims without extensive discussion. "[A]rtifice and stratagem, including the use of paid informants whose employment is made necessary by the investigation, may be constitutionally resorted to to uncover and identify those engaged in criminal enterprises." United States v. Cuomo, 479 F.2d 688, 692 (2d Cir.), cert. denied, 414 U.S. 1002 (1973). See also United States v. Russell, 411 U.S. at 436 ("there are circumstances when the use of deceit is the only practicable law enforcement technique available"). As this court has stated, "Undercover police work in general, and the use of men

such as [the informant] in specific, is an unattractive business, but that is the nature of the beast . . . ." United States v. Kaminski, 703 F.2d at 1010. Here, we find nothing outrageous in the use of Farthing or in the perpetration of a few deceptive acts and statements in the furtherance of the investigation.

The defendants also argue that the Secret Service's undercover investigation was particularly outrageous because it was unnecessary. They claim that the government could have prevented them from counterfeiting by simply monitoring any activity around the printing press, a large, rather immobile piece of equipment, or by investigating their previous counterfeiting attempt and prosecuting them for that. However, it is not clear

to us that either of these choices would have been effective or even feasible. More important, we are not inclined to second-guess the executive branch concerning its choice of law enforcement techniques. While we hesitate to say that the government's available alternatives can never be relevant to a court's consideration of an outrageous government conduct claim, we are mindful of the Supreme Court's admonition that the federal judiciary should not exercise a "'chancellor's foot' veto over law enforcement practices of which it [does] not approve." United States v. Russell,

411 U.S. at 435.[6] Here, we find nothing outrageous about the government's choice of law enforcement techniques. Hence, we reject the defendants' claim that the government's undercover investigation constituted outrageous government conduct in violation of the due process clause, or that it provides us with a basis for the exercise our supervisory powers to vacate the defendants' convictions.

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6. Many courts explicitly have expressed their disapproval of the undercover law enforcement practices being challenged in cases before them, while at the same time upholding the constitutionality of those practices. See e.g., United States v. Beverly, 723 F.2d 11, 13 (3d Cir. 1983); United States v. Garrett, 716 F.2d 257, 275 n.10 (5th Cir. 1983); United States v. Kelly, 707 F.2d 1460, 1477 (D.C. Cir.), cert. denied, 104 S. Ct. 264 (1983); United States v. Leja, 563 F.2d 244, 246 (6th Cir. 1977), cert. denied, 434 U.S. 1108 (1978).

B. The Search Warrant

The defendants have also challenged the government's execution of its search warrant. Specifically, they claim that the government agents sought a warrant and then purposely delayed its execution until they were sure that the defendants had produced counterfeit currency of sufficient similitude to real currency to constitute a violation of federal law. They further object to the fact that during the four-day interval between the procurement of the warrant and its execution, Farthing provided them with more printing supplies. They contend that the government's handling of the search warrant amounted to outrageous government conduct, particularly in combination with the rest of the undercover investigation. Alternatively, they argue

that the delayed execution of the search warrant amounted to an independent violation of their fourth amendment rights, because the facts forming the basis on which the warrant was issued were changed before it was executed. They claim not that this violation of their rights required the suppression of evidence at trial -- they are foreclosed from arguing this because they did not raise it at trial -- but that it "is itself independent and most compelling evidence of the constitutional misconduct that infected all parts of this prosecution." Belzer's Reply Br. at 2.

We do not find that the government's delayed execution of the search warrant makes its conduct in this case "outrageous." Although the defendants have suggested that the Secret Service manip-

ulated the judicial process by obtaining a search warrant and then waiting to execute it until they were sure that the defendants had committed a crime, they failed at trial to elicit any evidence concerning the reasons for the government's conduct. Thus, there is an inadequate record to support their manipulation theory. Moreover, on the facts of this case it appears that there was no reason for the government to have manipulated the judicial process. We do not see what advantage the government would have gained by seeking a search warrant before it was prepared to execute it. While one can imagine a situation where law enforcement officials obtain a warrant as quickly as possible before circumstances giving rise to probable cause have a chance to change, this is not such

a case. Probable cause in this case was present as long as the defendants' operation in the slaughterhouse was in existence, a situation that the Secret Service was monitoring closely. Thus, the real question is not why the government delayed execution of the warrant, but why it sought a warrant as early as it did.

The most obvious explanation is that the Secret Service obtained the warrant before realizing that the defendants had not yet produced any counterfeit bills of sufficient quality to pass as genuine bills. Once they had this realization, they decided to postpone execution of the warrant until they would have a proper basis for arresting the counterfeiters. According to this theory, the government was perhaps a bit inept, but not manipulative. Although our theory

may be incorrect, the defendants have done nothing to contradict it. In short, the defendants are alleging that the government's handling of the search warrant amounted to outrageous governmental conduct, and yet they have failed to make a factual showing that in securing or executing the warrant, the government intentionally manipulated or abused the judicial process. In the absence of such a record, we will not find outrageous governmental conduct on the basis of the Secret Service's delay in executing the search warrant.

Nor will we find outrageous governmental conduct on the basis of Farthing's furnishing of supplies to the defendants after the search warrant was issued. Farthing was responding to the defendants' request for him to replenish their

depleted stock of supplies. To refuse their request might have seemed unusual, in light of his previous willingness to assist them, and thus might have jeopardized his cover. Allowing the Secret Service in this case to continue to assist the defendants even after obtaining a search warrant for their premises admittedly tends to underscore the somewhat active role that law enforcement officials are permitted to play in criminal enterprises that they are investigating. However, this latitude that we permit law enforcement officials clearly is an accepted feature of our jurisprudence, as we have already discussed. Given that is was permissible for the government to furnish the defendants with materials used in their counterfeiting operation, we find that the

fact that some of these materials were furnished after the government obtained its search warrant makes no difference for purposes of this appeal.

Finally, we turn to the defendants' claim that the delay rendered the search warrant defective and that thus their fourth amendment rights were violated. We recognize that there is at least a question as to whether the warrant became defective because of the delay. Compare United States v. Bedford, 519 F.2d 650, 655 (3d Cir. 1975) (warrant must be executed within "reasonable time" after issuance; reasonableness "functionally measured in terms of whether probable cause still existed at the time the warrant was executed"), cert. denied, 424 U.S. 917 (1976) with United States ex rel. Beal v. Skaff, 418 F.2d 430, 433 (7th Cir. 1969) ("a 'stale warrant,' the execution

of which is unduly delayed by the police in order to assure the seizure of the goods sought, is invalid"). However, we need not decide that question. If the warrant was defective, the proper remedy would have been the suppression of evidence seized pursuant to the warrant, a remedy which the defendants chose not to pursue. Although it is possible that the improper execution of a search warrant might be relevant to a claim of government misconduct, as the defendants contend, we find on the facts of this case that even if the search warrant was defective, in the absence of a showing that the government intentionally manipulated or abused the judicial process, the government's conduct does not provide a sufficient ground for vacating the

the defendants' convictions.[7]

The defendants' convictions are affirmed.

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7. In United States v. Kaminski, 703 F.2d 1004, 1009 (7th Cir. 1983) and United States v. Thoma, 726 F.2d 1191, 1198 (7th Cir. 1984), cert. denied, 104 S. Ct. 2683 (1984), this court indicated that if in the course of its investigation, the government violates the defendants' constitutional rights, the "truly outrageous" standard would not be applicable. We hold today that the government's handling of the search warrant does not invalidate the defendants' convictions, even under a standard less permissive than the "truly outrageous" standard.

APPENDIX B

Judgment of the Court of Appeals

of

September 18, 1984

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

September 18, 1984

Before

HON. RICHARD A POSNER, Circuit Judge

HON. JOEL M. FLAUM, Circuit Judge

HON MYRON L. GORDON, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
Nos. 83-2130, 83-2146 83-2175	)
JOHN A. BELZER, JR., JOHN M. EVANS, and RICHARD CLEMENTS, Defendants-Appellants.	)

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 83 CR 2
Judge Allen Sharp

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* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

This cause was heard on the record of the United States District Court for the Northern District of Indiana, South Bend Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX C

Order of the Court of Appeals

of

October 18, 1984

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

October 18, 1984

Before

HON. RICHARD A POSNER, Circuit Judge

HON. JOEL M. FLAUM, Circuit Judge

HON. MYRON L. GORDON, Senior District Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
Nos. 83-2130, 83-2146 83-2175	)
JOHN A. BELZER, JR., JOHN M. EVANS, and RICHARD CLEMENTS, Defendants-Appellants.	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, SOUTH BEND DIVISION
NO. 83 CR 2
Judge Allen Sharp

* The Honorable Myron L. Gordon, Senior District Judge for the Eastern District of Wisconsin, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by Defendant-Appellant John A. Belzer, Jr., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

Excerpt from 18 U.S.C. 371 and 18 U.S.C. 471 and 18 U.S.C. 474

Section 371, Title 18 of the United States Code, provides in part,

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both
>
> . . . .

Section 471, Title 18 of the United States Code, provides,

> Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

Section 474, Title 18 of the United States Code, provides,

> Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other

security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obli-

gation or other security has been printed, with intent to use such plate, stone or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or

Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States --

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.